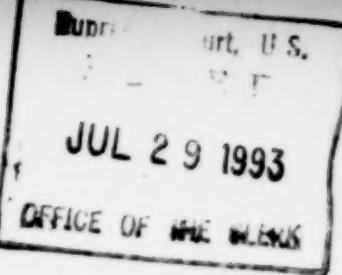


(6) No. 92-1500



**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1992

Paul Caspari, Superintendent
The Missouri Eastern Correctional
Center, and
Jeremiah W. (Jay) Nixon,
Attorney General
of Missouri *Petitioners*
vs.
Christopher Bohlen *Respondent*

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

JOINT APPENDIX

Jeremiah W. (Jay) Nixon
Attorney General of Missouri

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Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

**PETITION FOR CERTIORARI FILED ON MARCH 5, 1992
CERTIORARI GRANTED ON JUNE 14, 1993.**

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JOINT APPENDIX

**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

<u>Date</u>	<u>Proceedings</u>	
Sept 5, 1989	Petition for writ of habeas corpus filed in United States District Court for the Eastern District of Missouri.	time to file traverse filed by petitioner.
May 29, 1990	Habeas corpus (non-death penalty) submitted to Judge Clyde Cahill for determination.	TRAVERSE to State's answer filed by petitioner.
May 30, 1990	Cause assigned to Magistrate David Noce. Show cause order issued.	Magistrate's Report and Recommendations recommending dismissal of petition unless petitioner deletes certain unexhausted grounds for relief.
May 30, 1990	Docket sheet and file forwarded to Magistrate Unit.	Objections to U.S. Magistrate's Report and Recommendation filed by respondent.
June 29, 1990	Motion for extension of time to file responsive pleadings up to 7/29/90 filed by respondent	Request for additional time until January 4, 1991 to respond to court's order of December 18, 1990 filed by petitioner.
July 20, 1990	Response to court order filed by respondent w/ exhibits A-G and K-O attached.	Petitioner's motion for extension granted.
Aug. 7, 1990	Request for time within which to respond to the state's answers filed by petitioner, granted.	Response to the Report and Recommendation of the U.S. Magistrate filed by petitioner.
Sept. 14, 1990	Request for extension of time to file traverse filed by petitioner. Granted.	Motion of 12/18/90 and file delivered to Judge Cahill.
Sept. 20, 1990	MOTION to correct clerical error in petitioner's request for extension of	Order returning cause to Magistrate for determination of all non-dispositive matters filed.

April 10, 1991	Response to court's order to show cause why a writ of habeas corpus should not be granted filed by respondent.	Sept. 18, 1991	Application to proceed without prepayment of costs and affidavit in support by petitioner.
April 26, 1991	Request for time within which to file a traverse to respondent's response filed by petitioner.	Sept. 18, 1991	Notice of appeal by plaintiff/appellant. Fee in forma pauperis.
April 26, 1991	Order providing petitioner to and including 5/3/91 to file a traverse.	Sept. 23, 1991	Petitioner's request for certificate of probable cause denied
May 3, 1991	Traverse to respondent's response and memorandum of points and authorities in support thereof filed by petitioner.	Sept. 23, 1991	In forma pauperis is granted
Aug. 14, 1991	Magistrate's Report and Recommendation denying petition for a writ of habeas corpus without further proceedings.	Oct. 7, 1991	Record Delivered to United States Court of Appeals
Aug. 26, 1991	Objections to the Report and Recommendation filed by petitioner.	Oct. 21, 1991	Prisoner Case Docketed in United States Court of Appeals for the Eighth Circuit
Aug. 28, 1991	ORDERED that the Magistrate's Report and Recommendation is sustained and adopted as order of this court. Further ordered that petitioner's request for a writ of habeas corpus is denied for the reasons set forth.	Oct. 21, 1991	Motion of appellant Christopher X. Bohlen for appointment of counsel.
Sept. 18, 1991	Request for certificate of probable cause by petitioner.	Oct. 22, 1991	Letter to United States District Court from United States Court of Appeals for the Eighth Circuit - notice of appeal treated as an application for certificate of probable cause.
		Oct. 25, 1991	Appearance for appellee, attorney Frank A. Jung
		Nov. 7, 1991	Certificate of Probable Cause granted to the extent that the appeal shall be

	limited to the double jeopardy issue. Clerk of the United States District Court directed to appoint counsel to represent appellant and establish briefing schedule.		
Nov. 7, 1991	C.J.A. voucher issued. Richard Holland Sindel of Clayton, MO is hereby appointed under the Criminal Justice Act to represent appellant.	Dec. 13, 1991	Order filed granting in part appellant motion for extension of time to file brief.
Nov. 7, 1991	Briefing schedule established in United States Court of Appeals for the Eighth Circuit.	Jan. 9, 1992	Brief of appellant filed.
Nov. 19, 1991	Appearance for appellant, attorney Richard Holland Sindel.	Jan 9, 1992	Records received.
Dec. 9, 1991	Designation of record received from Appellees.	Jan 10, 1992	Case is no longer pro se.
Dec. 9, 1991	Appearance of Frank A. Jung for respondent received in United States District Court for the Eastern District of Missouri	Feb. 13, 1992	Motion of appellees for extension of time to file brief.
Dec. 9, 1991	Counter designation of record by respondent.	Feb. 14, 1992	Order filed granting in part appellee motion for extension of time to file brief.
Dec. 12, 1991	Motion of appellant for extension of time to file brief.	Mar. 2, 1992	Motion of appellee for extension of time to file brief.
		Mar. 2, 1992	Order filed granting appellee motion extension of time to file brief.
		Mar. 11, 1992	Brief of appellee received on 3/9/92
		Mar. 12, 1992	Appellee's brief to motion practice unit.
		Mar. 16, 1992	Records received.
		Mar. 18, 1992	Returned from screening.
		Mar. 23, 1992	Order filed granting appellant's motion for extension of time to file reply

	brief.		judgment filed.
Mar. 27, 1992	Reply brief filed by appellant.	Oct. 30, 1992	Order filed granting document null.
Apr. 27, 1992	Set for argument on June Docket in St. Louis.	Nov. 5, 1992	Petition for rehearing with suggestions for rehearing en banc filed by appellees.
June 9, 1992	Argued and submitted in St. Louis to Judges John R. Gibson, Circuit Judge, Gerald W. Heaney, Senior Judge, C.A. Beam, Circuit Judge.	Nov. 6, 1992	Motion of appellant to file an amended opinion.
Oct. 16, 1992	The Court: John R. Gibson, Gerald W. Heaney, C.a. Beam. Opinion filed by C.A. Beam PUBLISHED	Nov. 16, 1992	Clerk letter sent - Counsel for appellee is directed to file a response.
Oct. 16, 1992	Judgment: John R. Gibson, Gerald W. Heaney, C.A. Beam: The judgment of the District Court is reversed and remanded with directions for proceedings consistent with the opinion of this Court.	Nov. 23, 1992	Response of appellee in support of appellant motion to file an amended opinion.
Oct. 30, 1992	Motion of appellees Paul D. Caspari and William Webster for extension of time to file petition for rehearing en banc	Nov. 27, 1992	Received appellee response to petition for rehearing with suggestions for rehearing en banc.
Oct. 30, 1992	Order granting appellee's motion for extension of time to file petition for rehearing.	Dec. 1, 1992	Received reply from Appellant regarding appellees response to appellant's motion to amend judgment.
Oct. 30, 1992	Appellant's motion for extension of time to file a motion to amend the	Dec. 8, 1992	The suggestion for rehearing en banc is denied. Petition for rehearing also denied.
		Dec. 11, 1992	Opinion correction.
		Dec. 11, 1992	Order granting appellant's motion to file an amended opinion.
		Dec. 14, 1992	Motion of appellee to stay mandate.

Dec. 15, 1992	Response by appellant in opposition to appellee's motion to stay mandate.		petitioner.
Dec. 23, 1992	Order denying appellee's motion to stay mandate.	Feb. 19, 1993	Response to respondent's opposition to petitioner's motion to modify court order filed by petitioner.
Jan. 27, 1993	Conditional writ of habeas corpus consistent with the opinion of the Eighth Circuit granted by U.S. District Court.	Mar. 9, 1993	Memorandum and Order granting writ of habeas corpus; further ordered that Circuit Court of St. Louis shall resentence the petitioner without application of persistent offender statute or grant petitioner a new trial.
Feb. 1, 1993	Judgment of Eighth Circuit received in District Court		
Feb. 2, 1993	Mandate issued	Mar. 23, 1993	United States Supreme Court notice regarding petition for writ of certiorari.
Feb. 3, 1993	Motion to modify District Court order filed by petitioner.	Mar. 24, 1993	Notice of filing for writ of certiorari received in District Court.
Feb. 4, 1993	Receipt for mandate.		
Feb. 9, 1993	Records sent out of the office to lower court at the end of appellate proceedings.		
Feb. 9, 1993	District Court records receipt of records from Eighth Circuit.		
Feb. 11, 1993	Opposition to petitioner's motion to modify District Court's order filed by respondent.		
Feb. 19, 1993	Entry of Cheryl A. Rafert on behalf of		

SENTENCING

[P.336] On Friday, October 15, 1982, defendant appeared with his attorney and the State by its attorney, in Cause No. 456384, State of Missouri vs Christopher Bohlen, before Honorable Milton Saitz, Judge, Div. 17, St. Louis County Circuit Court.

APPEARANCES

ATTORNEY FOR STATE.....MRS. VICKI MCKEE
Assistant Prosecuting Attorney

ATTORNEY FOR DEFENDANT..MR. KENNETH LEEDS

JUDGE SAITZ: State of Missouri versus Christopher Xavier Bohlen. Do you have anything outside of what's contained in the court memorandums?

MR. LEEDS: I want to be sure the record is complete. You should have a verified motion for new trial. You should have an amended verified motion for new trial, which would be in paragraph eleven. Is that contained in the file?

THE COURT: Let me check here. Yes.

MR. LEEDS: And Mr. Bohlen also filed his verified motion for a new trial. Aside from that there is a partial transcript of the trial proceedings in which –
(to the court reporter) – I don't know if you provided the Court with a copy –

I will read it into the record. I will make it part of the record as well.

[P.337] THE COURT: Read it in?

MR. LEEDS: I am going to take this up with my motion if you have no objection.

THE COURT: I am not going to hear anything in addition to what you put in your memorandum.

MR. LEEDS: I'd like to acknowledge, file this. Actually what it is, it's supplement paragraph 11.

THE COURT: All right. I'll make this part of the record. This is a partial transcript of the trial?

MR. LEEDS: At the trial. Specifically, regarding the question of whether or not there was a film, piece of surveillance film, and certain comments made by the prosecuting attorney, which I feel were extremely prejudicial, called for a mistrial. And at a certain point in that proceeding you were inclined to grant a mistrial because of certain statements by the prosecuting attorney.

THE COURT: Okay. I will make this part of your motion.

MR. LEEDS: Just as an exhibit to the amended count, Judge?

THE COURT: Yes. Do you have anything else, then, other than this?

MR. LEEDS: You have got the entire record, Judge.

THE COURT: Okay. Do you have anything?

MS. MC KEE: No. The State has nothing.

THE COURT: Will you step up. You are the defendant, Christopher Bohlen; is that right, sir?

DEFENDANT BOHLEN: Yes, sir.

[P.338] THE COURT: All right. Before we begin with the sentencing, for the record the defendant's motion for a new trial will be overruled.

Q Mr. Bohlen, you appeared in this court July 1st of this year, at which time the jury returned a verdict of guilty of robbery in the first degree on Counts I, II and Count III. At that time the verdict of the jury was received and the Court ordered a presentence investigation in this matter by the Missouri State Board of Probation and Parole. I wish to advise you, sir, that the Court has a copy of that report and is aware of its contents. I now ask you, sir, do you or anyone on your behalf have any legal cause to show why sentencing ought not to be pronounced against you at this time?

A Legal motions that my attorney filed for new trial.

Q Aside from those you do not have—

A No, sir, I don't have anything more.

THE COURT: All right. Mr. Leeds, do you know of any legal reason why sentencing should not be pronounced at this time?

MR. LEEDS: As Mr. Bohlen stated, other than what's contained in the record I have no additional grounds.

THE COURT: All right. No legal reason having been shown, which would preclude pronouncement of sentence, the Court will now entertain submissions and evidence relevant to the sentence to be imposed in this case.

Do you have a statement you'd like to make on the record, [P.339] Mr. Leeds?

MR. LEEDS: Well, Judge, I think that the Psi speaks for itself in some degree. I think that Mr. Bohlen's present incarceration has indicated to the prison personnel and the educational staff at the prison that Chris has been a model inmate; that if sentence is passed and it's the Court's decision to incarcerate Mr. Bohlen, that would be considered as a mitigating circumstance, that Mr. Bohlen has shown a very high interest in both developing his mind and that he has conformed to the disciplinary requirements of the county jail very effectively, and he has performed as a model prisoner. In addition to which, if the Court decides that incarceration is required, then Mr. Bohlen be given credit for time served. Other than that, Judge, I believe that, once again, the record is probably complete.

THE COURT: Okay. Mr. Bohlen, do you have anything you wish to say in your own behalf?

MR. BOHLEN: Yes, sir, I do.

THE COURT: Speak up, sir.

MR. BOHLEN: I would like to say, even though—although I have been convicted of these crimes I am actually not guilty of it nor did I have any knowledge of the crime at the time they occurred. And that the way I was convicted, you know, a whole lot of controversial things happened at trial, like the police officer who arrested me showed my picture to a guy, witness, split second, I had reported—[P.340] down.

A That controversial thing that happened and the way that my picture was shown to two eye witnesses that made a split-second i.d. of me and the fact that my counsel, just being the first trial he ever had to try, and with his years of experience, which is a couple of years, of my knowledge being up against a prosecutor like Rick Barry, who has never lost a trial, you know, seems like the odds against me were overwhelming as far as the opposition was concerned. And the people who pulled this robbery reportedly had on ski masks, all of them; I can't, you know, it just really doesn't make any sense to me why I would be perpetrating a crime and go with somebody who robs a place and everybody had on a ski mask and I wouldn't put on one, and put a gun in the person's face to rob them. And I know my presentence report probably has more or less "defamated" my character from previous convictions I have had in the past, none of

which are for robbery, armed robbery. And I never would, I never have or I never would rob anyone no way. I just want for the record to show that. Even though I have been convicted I am actually not guilty of this crime.

THE COURT: Does the State have any comments?

MS. MC KEE: No, your Honor.

THE COURT: All right. The Court being fully informed of the circumstances surrounding the charges and finding no cause [P.341] having been shown which would preclude pronouncement of sentence, it is the sentence of the law and the judgment of this Court that you be sentenced to a term not to exceed fifteen years in the Missouri Department of Corrections on Count I of Robbery in the First Degree. It is the further finding of this Court that you be sentenced to a term not to exceed fifteen years on the charge of robbery in the first degree on Count II. And it is the further order of this Court that you be sentenced to a term not to exceed fifteen years on the charge of robbery in the first degree under Count III. These fifteen-year sentences are to run consecutive. You will be given credit for time served. I will waive the court costs. And, in addition, there will be a judgment entered against you in behalf of the State in the amount of \$26.00 pursuant to the Victim Compensation Act.

MR. LEEDS: Can I ask the Court to reconsider, have the sentences to run concurrent as opposed to consecutive.

THE COURT: I have taken that into consideration, and your request will be denied, they will run consecutive. That will conclude the record.

11:35 a.m. - COURT IN RECESS.

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

STATE OF MISSOURI,)
)
Plaintiff,) Cause No. 456384
)
vs)
)
CHRISTOPHER X. BOHLEN,) Div. No. 17
)
Defendant.)

HONORABLE MILTON SAITZ,
Judge - Div. No. 17

RESENTENCING: Monday, August 13, 1984

TRANSCRIPT OF PROCEEDINGS

ATTORNEY FOR THE STATE:

MS. PHYLLIS WEBER
Assistant Prosecuting Attorney
Courthouse
Clayton, Missouri 63105

ATTORNEY FOR DEFENDANT:

MR. FRANK ANZALONE
111 So. Bemiston - Suite 211
Clayton, Missouri 63105

CERTIFIED COURT REPORTER: MARY F. DOLANSKY - Div. 17
[P.1] On Monday, August 13, 1984, defendant Christopher X. Bohlen, together with his attorney, and the State by its attorney, appeared before HONORABLE MILTON SAITZ, Judge, Div. 17, St. Louis County Circuit Court, in Cause No. 456384.

APPEARANCES

ATTORNEY FOR STATE . . . MRS. PHYLLIS WEBER
Asst. Pros. Atty.

ATTORNEY FOR DEFENDANT . . .
MR. FRANK ANZALONE

MRS. WEBER: Will you mark these,

STATE EXHIBITS A - D, marked for identification

THE COURT: Are you ready to proceed?

MRS. WEBER: Yes.

MR. ANZALONE: Yes.

MRS. WEBER: Your Honor, in accordance with strike that, please. Defendant was found guilty by a jury July 1st of 1982. And at this time, your Honor, I would like to submit to the Court four prior felony convictions. And the State alleges that defendant is a persistent offender as defined

in 558.016.3, RSMo, and is punishable by sentence to an extended term of imprisonment under 557.036.2(2), 557.036.4 and 558.016.6, RSMo. The State alleges that the defendant has been convicted of four [P.2] prior felonies occurring at different times and not related to this crime. And to substantiate these allegations we are introducing into evidence State's, we are offering into evidence State's Exhibits A, B C and D; State's Exhibit A being a certified and authenticated copy of the judgment and sentence in which the defendant, Christopher Bohlen, on June 20, 1974, was convicted of illegal possession of Schedule One, Controlled Substance, Heroin, and at that time he was sentenced to two years in the Missouri Department of Corrections, this judgment and sentence having taken place in Division 18 of the Circuit Court of the City of St. Louis and State of Missouri.

State's Exhibit B is an authenticated and certified copy of the judgment and sentence from the Circuit Court of St. Clair County and it contains a copy of the Bill of Indictment as well as a copy of the court record of a plea and sentencing. And according to the Bill of Indictment on 11 - it was claimed that on the 11th of September 1975 that Christopher Bohlen committed the crime of violation of controlled substance act, and that on April 14, 1978 in the Twentieth Judicial Circuit of Illinois, St. Clair County, he

was sentenced at that time to a term of three years.

State's Exhibit C, an authenticated certified copy of the Bill of Indictment as well as minutes of the plea and sentencing, according to the Bill of Indictment on April 15, 1975 it was claimed that Christopher Bohlen committed the offense of unlawful [P.3] delivery of controlled substance. And on April 14, 1978 he was sentenced, and he was sentenced on that occasion also to a term of three years. This was also in the Circuit Court of St. Clair County for the Twentieth Judicial Circuit of Illinois.

State Exhibit No. D, also an authenticated and certified copy of the judgment and sentence, includes also a Bill of Indictment and a copy of guilty plea, minutes from the court. It was alleged that on September 4, 1975, Christopher Bohlen committed the offense of violation of controlled substance act. And on April 14, 1978 that he was sentenced to a term of three years in the Circuit Court—pardon me, sentenced to a three-year, term of three years. This occurred in the Circuit Court, Twentieth Judicial Circuit of St. Clair County.

In State's Exhibits B, C and D it is indicated that the defendant appeared in person and with counsel, your Honor.

MR. ANZALONE: In response to that, your Honor, the purpose, of course, we are here is to determine whether the defendant at this time can legitimately be sentenced as a

persistent offender. On the record I would object to the Court considering documents relating to the defendant being a persistent offender for the following reasons. Number one, this case, of course, was already tried one time and the State presented all the evidence or was allowed to present all the evidence it wanted to at that time. And there was no evidence whatsoever presented as to the defendant's record at that time. And apparently the [P.4] Court erroneously sentenced the defendant as a persistent offender because of a combination of failure of the State to prove these allegations and the apparent negligence of his counsel in noticing the State hadn't proved or even brought up in any way these allegations. And so it would be our contention under Brooks versus United States that this, in effect, would be a violation of the defendant's rights, to double jeopardy, because in an entire proceeding the defendant was never proven to be a persistent offender. And this is not a question, as in those cases, where the proof was not valid or where the proof was insignificant or insubstantial. In this case there was no proof.

In addition to this, the second point I would make, as the defendant appears before the Court this morning there is no valid indictment charging him at any time with being a persistent offender. The only valid indictment in this case was an indictment that was returned by the Grand Jury in St.

Louis County which charges him with four counts of robbery. Sometime subsequent to that, February 9, 1982, apparently Mr. Rick Barry or someone from his office put in the file a document which purported to amend that original indictment by way of Information. It would be our contention if the Court examines the court file this was not a valid Information in any way, for two reasons. Number one, if you will notice, it is not verified or signed. It is blank where a verification is supposed to be, the signing. It is not signed by Rick Barry as being verified or [P.5] sworn that it is true, which is one of the essential elements of an Information. In other words, that is blank. Number two, and I think this is equally important, even assuming that that was signed and verified and it was sworn according to the oath of Rick Barry that it was correct, this would not be a valid indictment or Information charging him with being a persistent offender, because the only thing that Mr. Barry claims or alleges on his belief, in effect, would be the four counts in this case. And the allegations of the persistent offender are actually underneath Mr. Barry's signature and not above it. And while I have never been able to find a case in Missouri on this point as to where the signature is transposed, I think a valid analogy would be in the case of where there is a legal pleading and there is a certificate of service, there is a case that the signature must be under the

certificate of service to verify the entire contents of the petition rather than in the middle of the petition and before the certificate of service. So, in effect, looking at it on the face of this, first of all, Rick Barry didn't verify this was correct or true; and, secondly, if he did verify it was correct and true, under the form the only form he verified was correct and true was Counts One through Four and did not verify in any way the allegations of persistent offender. That is nothing but a piece of paper stuck in the file. I don't think you can argue the defendant waived his right to have a verified Information in the trial, by any means, by going [P.6] to trial. Because, again, I think this would be different from those cases. In this case it is our contention that there was actually a valid Information - Indictment in the file, the defendant was validly indicted by a grand jury and there was a valid trial conducted and the defendant was not accorded his right to be sentenced by a jury because there is no document in that file that can be a valid Amended Information. For those two reasons. And, so, I would also object to the Court considering these other documents, therefore, as Ms. Weber as presented, on the grounds this is irrelevant, no specific allegations charging him as a persistent offender that's valid.

MRS. WEBER: Your Honor, he was sentenced to fifteen years on each Count on a Class A felony. Class A

felony is ten to thirty years anyway. If you were to sentence him to 15 years in the penitentiary, a Class A felony, it is in accordance with the term of years anyway.

MR. ANZALONE: If I can respond to that. The issue before us, which the Court of Appeals recognizes in its decision, is that unless the defendant is proven to be a persistent offender and is validly pled the defendant has a constitutional right to be sentenced by the jury and to have the jury determine his sentence, which did not happen in this case. There is no question from the Court of Appeals Opinion unless we can validly prove the defendant was charged and is a persistent offender the case must be remanded. In other words, the fact that you [P.7] sentenced him and you gave him a sentence within the— for the time frame, which was not enhanced, is irrelevant to the issues before you.

MRS. WEBER: As far as his being a persistent, a prior offender, however, I would point out to the Court that this case was returned by the Court of Appeals for the very purpose that we are here today. And I think that as far as the claim of double jeopardy, I am not so sure, Mr. Anzalone, that that applies to sentencing.

MR. ANZALONE: It is my contention that it does. But that was in the Court of Appeals decision. I guess what we are here today to determine is, number one, validated

charges of persistent offender; number two, whether that can be proven. If we get past that argument, I have other arguments about the specific documents Mrs. Weber has introduced. I don't think we will ever get to that if we assume there is no valid Information charging him as a persistent offender; he certainly could never be sentenced, so the documents would be irrelevant.

THE COURT: Well, is that in the form of a motion or what?

MR. ANZALONE: It would be an objection to the Court proceeding at this time and receiving those documents on the ground it would be irrelevant, on the ground that the defendant has not ever been pleaded to be a validated persistent offender.

THE COURT: For the record, the defendant's objection will be overruled. The Court does find that the defendant is [P.8] properly charged and is properly pleaded, with regard to being a persistent offender. Are you offering A through D at this time?

MRS. WEBER: Yes, sir.

MR. ANZALONE: Can I object? I have the following objections to those. As to Exhibits Nos. B, C and D, there is no showing whatsoever that they relate to the same individual who is standing before you, Christopher Xavier Bohlen, who is charged with being in the indictment

in this case. The only thing the State I suppose can rely on in this case is the so-called principle of identity of names whereas there is an assumption if the person has the same name it is the same person. In this case the three Illinois convictions are for a person, B-O-L-E-N, Christopher Bolen, which is a different person or at least there is no showing it's the same person as the defendant in this case. So, in the absence of any further proof that those documents refer to the man in front of you, the conflict of identity of names does not apply.

MRS. WEBER: Would you mark this.

STATE EXHIBIT E - marked for identification.

MR. ANZALONE: In addition, 557.036, Statute under which the State is attempting to proceed at this time, that changed the old Habitual Offender Statute and worded it differently in that the requirement now for the State is that they must prove [P.9] that the defendant was previously convicted of felonies, not merely crimes, that would be felonies if they were committed in Missouri. There is a recent case on this that says if something is a felony in another state that would suffice for whether it is a felony in Missouri or not. Those three documents, B, C and D, do not indicate in any way the defendant pled to or was found guilty

of anything that was a felony in the State of Illinois and therefore they would be irrelevant to our proceedings absent further proof that those were in fact felonies the defendant pled guilty to and was sentenced to. In addition, in so far as the Exhibit A is concerned, again I would object to the reception of that on the grounds that, number one, the identify of names does not apply. There is no showing that this applies to this specific man, Christopher Xavier Bohlen, as he is charged with being, in that this is a sentencing purported to be of a Christopher Bolen. In addition to that, there is no showing on this document, State Exhibit A, that at the time the defendant was— pardon me, pled guilty he was represented by an attorney, as is one of the requirements under the Missouri constitution and the statutory construction thereof. This merely shows he was represented by an attorney at the time of sentence. It does not show an attorney at the time of the plea of guilty, merely mentions having pled guilty on a prior date. And I would also object to each and every one of the documents on the grounds they are not self-authenticated. We [P.10] have no testimony here from anyone who allegedly authenticated those documents, that in fact the individuals who signed them are in fact individuals who hold the positions that they purport to hold. I don't think the Court can take notice of that since A, B, C and D are all documents which purport to come from

another jurisdiction other than St. Louis County.

MRS. WEBER: Do you want me to answer?

THE COURT: No; it won't be necessary. Do you have another exhibit?

MRS. WEBER: Well, it was merely— I was just checking it, but—

THE COURT: Well, for the record, the defendant's objection to the State Exhibits A through D will be overruled. Consequently, Exhibits A through D will be received in evidence. Do you have anything else?

MRS. WEBER: No.

MR. ANZALONE: We have no evidence.

THE COURT: Let the record show that the Court finds the defendant is a persistent offender as defined in Chapter 558.016.3 and consequently punishable by a sentence, by sentence of extended term of imprisonment under Section 557.036, and finds that the defendant has been previously convicted of four felonies committed at different times and not related to this crime for which he is charged.

MRS. WEBER: Your Honor—

[P.11] (OFF THE RECORD DISCUSSION.)

THE COURT: And let the record further show that the Court finds the defendant is a prior offender. Before we

go into the actual sentencing we did have a couple of preliminary matters to take up. One is your motion, first of all, for a change of judge. Do you want to speak on behalf of that motion?

MR. ANZALONE: My own contention would be in this case this was remanded for sentencing where the defendant was sentenced as a persistent offender by the Court, and apparently through a combination of factors. At the time the Court sentenced him there was no evidence before the Court as to his record and while true the Court acted in good faith at the time, I am not claiming that the Court didn't, I think that that fact alone would be sufficient for the Court to either act on our motion to disqualify itself or its own motion.

THE COURT: Mrs. Weber, do you have anything to say on that?

MRS. WEBER: Your Honor, you heard the evidence in the case. I think it is without question you are the appropriate person to do the sentencing. I don't think there is any reason that would call for either you disqualifying yourself or the defendant doing so.

THE COURT: All right. For the record, the defendant's motion for a change of judge will be overruled.

MR. ANZALONE: In addition, your Honor, we have filed a motion before you for a presentence

investigation, and I would [P.12] ask that you grant this for the following reasons. Number one, it's been a few years since the defendant was sentenced by the Court. In that time he's been involved in several programs in the penitentiary, including a school that he is in now. And I think before sentencing him, as a matter of fairness, the defendant requests that you consider his present suitability for a specific sentence rather than possibly a suitability based upon a presentence investigation two years ago. And the second reason I'd ask for this would be that I am more or less indicated the defendant's family— based upon a comment the Court made, I don't think it would be any great inconvenience to the system and would be fair for the defendant and for the Court to receive a statement of his present background.

THE COURT: Mrs. Weber?

MRS. WEBER: Your Honor, a presentence investigation was completed at the time of the trial. The Judge— you had information before you, and you have his background before you. This was two years ago. If you decide not to do a presentence after trial you don't even have to do so. And I think if the defendant is conducting himself in an exemplary fashion I think that's something for the authorities at Jefferson City to take into consideration, not this Court.

THE COURT: Mr. Anzalone, I indicated to you at the time you filed a motion for a presentence investigation and report by the Missouri State Board of Probation and Parole that I didn't [P.13] have any, at the time of filing it I didn't have any serious objection to it. But having had a chance to review the file, the entire matter, I am of the opinion that since there was a presentence investigation and report furnished the Court in August, as a matter of fact on August 25, 1982, I am going to deny a request at this time for an additional presentence investigation. Anything else?

MRS. WEBER: No, your Honor.

MR. ANZALONE: No other comments.

THE COURT: You are the defendant, Christopher Bohlen; is that right, sir?

DEFENDANT BOHLEN: Yes, sir.

Q Mr. Bohlen, I now ask you, sir, do you or anyone on your behalf have any legal cause to show why sentencing should not be pronounced against you at this time?

A Your Honor, my attorney said anything— I wouldn't know about the legal.

MR. ANZALONE: On the record, I would reemphasize the legal causes we mentioned before and repeat them as a grounds for impediment to the court sentencing.

THE COURT: The Court having been fully informed of the circumstances surrounding these charges and finding

no cause having been shown which would preclude pronouncement of sentence, the Court will now entertain submissions and evidence relevant to the sentence to be imposed in this case. Do you have anything [P.14] you'd like to say in your own behalf at this time?

MR. BOHLEN: No, sir.

MR. ANZALONE: Explain to the Judge you have been involved in prison- not legal reasons, but-

MR. BOHLEN: Since my incarceration I have been going to engineering drafting school and I have been diligently engaged in there making good grades. And I haven't had any institutional write-up, you know, for any kind of bad behavior, anything like that. And I have been a model prisoner. If I had to be sentenced at the time, which if I had to, if the sentence could run concurrent instead of consecutive, to save time, than the way they are now.

MR. ANZALONE: In addition to what he said, your Honor, there are several changes that have come about since the defendant was sentenced. Number one being the fact that he has made a valid effort, I think, to improve himself and to try to make something of his capabilities. In addition to that, the defendant is presently married to his wife, Talani Bohlen, who is an employee of the phone company, who has been, it is my experience from having contact with her at least 25 times in the last year-and-a-half or so, is a very

stabilizing influence on him. And she is here this morning showing an interest in him. I think she has changed him as a person. And while I think in light of the Court's prior sentence it is unrealistic to ask that the Court consider probation, I do think that it may be [P.15] realistic for the Court to reconsider its prior sentencing because, as the PSI indicates, the defendant's background of convictions is entirely for nonviolent offenses; in fact, most of them, as you have before you, involve drugs, drug use in some way, or stealing of some type. And I think the presentence investigation would show and trial testimony would show that, though the defendant professes his innocence, even if he were involved in this it would be part of a large group of people led by someone else, not led by the defendant, even according to the State's allegations. And I think since he's gotten away from those people there would be a realistic chance if he served a realistic sentence that possibly he may have some day been able to come out and be a benefit to society. I think if the Court would sentence him with these consecutive sentences it would make his future release anywhere in the early future highly unlikely, he'd have to serve one right after another. I'd ask the Court to maybe consider modifying the sentence in such a way to make them concurrent, more in line with possibly encouraging the defendant's hopes to some day become a productive member

of society.

THE COURT: Mrs. Weber?

MRS. WEBER: I have no comments.

THE COURT: The Court having found no causes having been shown which would preclude pronouncement of sentence, it is the sentence of the law and the judgment of this Court that you be [P.16] remanded to the custody of the Department of Justice Services to be imprisoned in the Missouri Department of Corrections for a term not to exceed fifteen years on Count One, charge being Robbery in the First Degree, Class A Felony. It is the further order of this Court that you receive a fifteen-year sentence on Count Two of Robbery First Degree, Class A felony. And that fifteen-year sentence will run consecutive with the fifteen-year sentence on Count One. Further order of this Court that you receive a term of imprisonment with regard to Count Three, the charge being Robbery First Degree, Class A Felony, and that fifteen-year sentence will run consecutive with the fifteen-year sentence in Count Two. I will waive the court costs and that will conclude the record.

CERTIFICATION OF COURT REPORTER

I, MARY F. DOLANSKY, do hereby certify that I am the Official Court Reporter in Div. 17, St. Louis County Circuit Court, and was acting in said capacity during the within proceedings.

I have prepared this verbatim transcript of proceedings on Monday, August 13, 1984, State vs Christopher Bohlen, Cause No. 456384.

(s) Mary F. Dolansky

CERTIFIED COURT
REPORTER - Div. 17

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION THREE

STATE OF MISSOURI,)
) No. 46436
Plaintiff-) Appeal from the
Respondent,) Circuit Court of
) St. Louis County
vs.)
) Hon. Milton Saitz
CHRISTOPHER XAVIER) Judge
BOHLEN,)
) OPINION FILED:
Defendant-) April 17, 1984
Appellant.)

Defendant-appellant was found guilty by a jury of three counts, each charging robbery in the first degree, §

569.020, RSMo 1978. He was sentenced by the court as a persistent offender, § 558.016.2, RSMo 1978, to serve consecutive fifteen-year sentences on each count.

The state charged that the defendant, acting with others, on April 17, 1981, entered a jewelry store in St. Louis County, Missouri, and took currency and jewelry from the store, Count I, a wristwatch from the manager of the store, Count II, and a wristwatch from the female employee, Count III. The manager of the store, a female employee and two customers were forced at gunpoint to a back room and ordered to lie on the floor. Witnesses saw four black males and two black females run from the store.

Identification was the central issue. Two witnesses were able to identify the defendant as being one of the robbers. There was evidence connecting the defendant with a cigarette lighter of the type of some lighters taken in the robbery. The defendant called three witnesses all of whom were in the vicinity of the robbery at the time of the occurrence and all of whom were unable to identify him as one of the robbers.

Appellant challenges the convictions on three grounds. First, he contends that the court erred in failing to dismiss Count III at the close of the state's case because the state failed to call the female employee whose wristwatch was taken in the robbery. Defendant maintains that he was

thereby denied his constitutional right to confrontation and cross-examination guaranteed under the Sixth Amendment of the Federal Constitution and applicable in this state under the Fourteenth Amendment. Second, defendant contends that the Court lacked jurisdiction to complete the trial because the judge granted a motion for mistrial during the state's closing argument. In the alternative, defendant contends that the requested mistrial was required by timely objection to the prosecutor's prejudicial closing argument. Third, the defendant contends the punishment should have been imposed by a jury as the state failed to prove that he was a persistent offender.

Appellant's first point is without merit. The Sixth Amendment guarantees a defendant in a criminal case the right "to be confronted with the witnesses against him" but it does not require the state to produce each and every witness who might present relevant testimony at trial. United States v. Polisi, 416 F.2d 573, 579 (2nd Cir. 1969). See State v. Smith, 632 S.W.2d 3, 5 (Mo.App. 1982). The constitutional guarantee of the Sixth Amendment is one of exclusion rather than mandatory inclusion. Invocation of the Sixth Amendment requires that evidence offered be excluded absent an opportunity by the defendant to test its credibility and probability by cross-examination. Ohio v. Roberts, 448 U.S. 56, 64 (1980). In this case, no such evidence was

offered. The store manager testified that when threatened at gunpoint, he gave his wristwatch to one of the robbers and he helped remove the female employee's wristwatch and handed it to the same person. By this testimony alone the state made a submissible case on Count III. It was not necessary to have the testimony of the owner of the wrist watch. Defendant's right to confrontation was not violated by her absence at trial. Turnbough v. Wyrick, 420 F.Supp. 588 (E.D.Mo. 1976) aff'd 551 F.2d 202 (8th Cir., 1977).

An understanding of the defendant's contention of error directed to his request for a mistrial requires additional facts. The store manager testified that a surveillance system camera was operating during the robbery and that after the robbery he gave the film to a police officer. The manager later viewed the film at a police station but the film was not offered in evidence.

In the opening portion of the state's closing argument the state argued "I believe the state has given you all the evidence you need to convict in this case." The defendant responded by arguing, "perhaps the most significant item in this whole case is something that you haven't seen, something that I haven't seen, something that none of us will ever see ... Cameras are not like the human mind; they record exactly what they see." Thereafter, in the final portion of the state's closing argument the prosecutor told the jury, "The

law obligates me, absolutely obligates me, to provide the defense with any information I have that will either condemn or exculpate the defendant." Defendant's objection that the state was arguing law and not evidence was properly sustained. State v. Holzwarth, 520 S.W.2d 17, 22 (Mo. banc 1975). Immediately thereafter, the prosecutor told the jury, "I assure you if I had a film that showed him, I'd show it to you. He knows that there was a film taken. He also knows that it didn't show a darn thing." The court sustained a general objection to that statement and the prosecutor thereafter immediately said, "There is no film."

Outside of the hearing of the jury the defendant requested a mistrial and the court said, "I'll grant it." In an effort to save the proceeding the prosecutor explained that he thought that the court's rulings referred only to not arguing the law, offered an apology, and urged the court not to grant the mistrial. The prosecutor then suggested that "the jury be instructed to disregard what I have just argued, that you personally reprimand me for arguing before the jury. ... Reprimand me and instruct the jury that they must disregard what I have just said." Defense counsel suggested that if the judge was inclined to rule in favor of the prosecutor then "I would only request the court to make a statement that there was a film, to counteract the statement of counsel." Following a discussion off the record the court overruled the

defendant's request for a mistrial. The court then announced to the jury, "Ladies and gentlemen of the jury, the court warns you to disregard the last statement of counsel." The court neither reprimanded the prosecutor nor did he make a statement about the existence of the film.¹

Appellant here contends that when the court sustained the motion for a mistrial jurisdiction to proceed was lost. This contention is simply not supported by the record. What occurred out of the hearing of the jury was an announcement by the court that he intended to grant a mistrial. After further argument he reversed his position. The initial statement was nothing more than an indication of intention at a time when the declaration of a mistrial was within the discretion of the court. State v. O'Neal, 618 S.W.2d 31, 35 (Mo. 1981). The jury never heard the motion for a mistrial or the ruling. No announcement was made to the jury nor did the court announce a declaration of mistrial. In addition, the defendant recognized the possibility that the proceeding would continue and requested alternative relief in the event a mistrial was not declared. The court granted the alternative request in so far as possible. No prejudice resulted. State v.

Harry, 623 S.W.2d 577, 579 (Mo.App. 1981).

In the second part of his argument for a mistrial the defendant contends that a mistrial was required because of the prejudicial effect of the prosecutor's statements concerning the film and his obligation to present the film to the defendant. There was no evidence to support the prosecutor's statement that the film did not exist. The evidence indicated that the film was delivered to a police officer and later viewed by the store manager. Absent evidence which described the history of the film from the time it was seen by the manager until the date of the trial is not proper for the prosecutor to argue either the duty of the state to produce it or what it may have disclosed. See State v. Moore, 428 S.W.2d 563, 565 (Mo. 1968).

The state's failure to justify non-production of the film once its' existence was established entitled the defendant to an inference that the contents of the film were unfavorable to the state's case. State v. Collins, 350 Mo. 291, 165 S.W.2d 647, 649 (1942). Defense counsel properly made that argument in his closing statement. The prosecutor's attempt to deny the defendant the benefit of the inference by asserting the film did not exist and that it did not show a darn thing was improper. Argument not supported in evidence or a misstatement of the evidence is generally regarded as error, especially if the statement of facts not in

¹There being no evidence that the film did not exist the court committed no error in not stating as a fact that it did not exist.

evidence is willful. State v. Swing, 391 S.W.2d 262, 265 (Mo. 1965). This type of conduct is particularly prejudicial where the prosecutor argued a matter immediately after the court sustained an objection in that regard. State v. Ralls, 583 S.W.2d 289, 292 (Mo.App. 1979). In the case at bar the prosecutor continued to discuss the film after an objection and after an earlier statement by the judge, during the state's case, to bring in the film. In this case we find that any error was not prejudicial because the jury admonition to disregard the prosecutor's comment was adequate to cure the prejudicial effect. State v. Wren, 643 S.W.2d 800, 802 (Mo. 1983).

Defendant's third point of error concerns sentencing. Our search of the record indicates that although the defendant was sentenced by the judge as a persistent offender no proof was made of the prior convictions. We requested the parties to supplement the record to prove that the prior convictions were presented to the court. No such proof was furnished. We remand for a hearing on the allegations of the prior convictions. If the prior convictions are proved defendant should be resentenced. State v. Holt, 660 S.W.2d 735, 739 (Mo.App. 1983). If the prior convictions are not proved the trial court judgment is reversed and defendant shall receive a new trial in order that a jury may consider all the issues.

Defendant's conviction is affirmed but the sentence is

reversed and remanded for resentencing based upon the evidence of prior convictions.

-Kent E. Karohl-
KENT E. KAROHL,
Presiding Judge

JAMES R. REINHARD, Judge Concurs
WILLIAM H. CRANDALL, JR.,
Judge Concurs